COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

2003/PLB/con/00020

In the MATTER of Article 27 of the Constitution of the Commonwealth of The Bahamas

B E T W E E N

CLARICE BUTLER

VALARIE STUBBS

DARREN SMITH

(as representatives of the "Seasoned Advertising Sales Consultant" of the Bahamas Telecommunications Company Limited)

Plaintiffs

AND

BAHAMAS TELECOMMUNICATIONS COMPANY, LTD.

Defendant

Before:	Hon. Justice Claire Hepburn
Appearances:	Carl Bethel (with Michael Foulkes) for the Plaintiffs
	Raynard Rigby (with Megan Taylor) for the Defendant
Hearing:	7 June 2011, 26, 27, 28 March 20, 6 and 7 August, 10, 24 September 2013

JUDGMENT

Hepburn J

The Claim

1. The plaintiffs are Sales Agents contracted by the defendant, Bahamas Telecommunications Company ("BTC") to sell advertisements in New Providence, the Family Islands and South Florida for BTC's Telephone Directory in accordance with their respective contracts with BTC and the Conditions of Service and the Procedure Manual of the Directory Publications Department, which are incorporated by reference into the contract by reference. The plaintiffs contend that they have a property interest in the revenue generated from or the accounts related to the sale of such directory advertisements in New Providence, the Family Islands and South Florida.
2. The plaintiffs describe themselves as "Seasoned Agents" to distinguish themselves from the new Sales Agents who were taken on by BTC in 2003. All of the Sales Agents are paid by commission. Each year the directory advertisement accounts from the previous year are assigned to returning Sales Agents, who, generally, are assigned the same directory advertisement accounts which they had worked the prior year or years. However, whenever new Sales Agents were taken on, a percentage (the plaintiffs contend that that percentage was about 17%) of the directory advertisement accounts which had been worked the previous year by the returning Sales Agents are retained by BTC for re-assignment to new Sales Agents, as happened in 2003, when BTC took on about 23 new Sales Agents.
3. The new Sales Agents were unhappy with the distribution of the directory advertisement accounts and after months of negotiations and meetings witness BTC by Memorandum dated 19 March 2003 to the Sales Agents from Claude

Hanna, Senior Manager, Directory Publications ("notifying the plaintiffs that BTC would reassign the reallocated the directory advertisement accounts on the basis of 55% to the returning Sales Agents and 45% to the new Sales Agents. The plaintiffs claimed by reallocating the directory advertisement accounts in the manner in which they did, BTC in breach of Article 27 of the Constitution deprived them of their personal property in the directory advertisement accounts and the revenue related thereto. The plaintiffs have brought this action seeking constitutional relief and damages for breach of contract.

4. This action was commenced by a generally indorsed writ of summons filed 8 October 2003, which is in the following terms:

> **"THE PLAINTIFF'S** (sic) **CLAIM AS REPRESENTATIVES OF THE SEASONED ADVERTISING SALES CONSULTANTS OF THE BTC IS AGAINST THE BTC OF THE FOLLOWING:-**
>
> 1. **A DECLARATION that the BTC violated Article 27(1) of The Bahamas Constitution in summarily depriving the Plaintiffs as a group of more than one-half of revenue;**
> 2. **DAMAGES for Breach of Contract and loss of chance;**
> 3. **SPECIAL DAMAGES**
> 4. **Economic Loss;**
> 5. **Interest;**
> 6. **Costs; and**
> 7. **Further or other relief"**

5. By their statement of claim filed 15 March 2004 the plaintiffs allege, inter alia, the following:

> **"3. The relationship between the Plaintiffs and the Defendant is regulated by a contract in writing renewable annually, which contract is usually renewed in the same or similar terms as the previous contract'**
> ...
>
> **8. Preparatory to the engagement of new Sales Agents referred to above it was agreed between the Plaintiffs and the Defendant that seventeen per centum (17%) of the existing revenue of each of the Plaintiffs would be made available to the Defendant for re-distribution to the new Sales Agents. This was agreed to by the Plaintiffs to assist in the facilitation of the new hiring policy and was in line with the previous practice by the Defendant.**
>
> **9. On or about the 14 February 2003 the Plaintiffs were mandated to turn in their contracts to the BTC's office and were informed that they would be permitted to retain "an identified", but unspecified, "amount of revenue" .**

10. On or about the 19 March 2003, in the midst of the new contractual year, the Defendant summarily informed the Plaintiffs that the revenue related to the Island of New Providence would be distributed in the following manner: "Returning Agents (old) 55%" and "Directory Publication (office) 45%". The Revenue retained by the Office was to be distributed as determined by the BTC, as was all revenue from the Family Islands and South Florida.

11. The cross-the-board deprivation of revenue was imposed by the Defendant without the consent of the Plaintiffs, and without regard to the provision of Clause 15 of the Contract.

12.The effect of the Memorandum of the 19th March 2003 was to summarily deprived the Plaintiffs of more than fifty percentum (50%) of their previous annual income, without compensation or due or adequate notice, and contrary to the amicable agreement referred to in paragraph 8 hereof.

13. Further and in addition, the effect of the Memorandum of the 19th March 2003 was to summarily deprive the Plaintiffs of the Goodwill built by each of the Plaintiffs in the contracts which generate the revenues of which the Plaintiffs were summarily deprived, without compensation or due or adequate notice, and contrary to the amicable agreement referred to in paragraph 8 hereof.

14. In consequence of the summary action of the Department, the Plaintiffs and each of them were, further, deprived of the chance to earn the said revenue over the ensuing contractual period.

15. The Memorandum of the 19th March 2003 and subsequent action of the Defendant in pursuance thereof were a breach of contract.

16. The Defendant has failed and/or refuse to compensate the Plaintiffs for the summary and wrongful action of the Defendant and for the aforesaid Breach of Contract.

17. Further or in the alternative, the actions of the Defendant were in breach of Article 27 of The Bahamas Constitution in that the Defendant deprived the Plaintiffs and each of them or property, namely revenue and goodwill, without compensation.

18. In consequence of the matters aforesaid the Plaintiffs and each of them have suffered loss and damages, special damages and economic loss.

6. By its defence filed 16 April 2004 and amended with the leave of the court on 20 March 20, BTC pleaded, inter alia, the following:

1.The Defendant contends that the description of the Plaintiffs as Seasoned Sales Agents do not confirm (sic) with the description as contained in the Agreement dated the 17th April 2003 and the Conditions of Service of Sales Agents which is an integral part of the aforesaid agreement.

....

5. The Defendant admits paragraphs 5 and 6 of the Statement of Claim and avers that Clause 15 of the Conditions of Service of Sales Agents also provided as follows: "During the final months of the canvass period the Company will re-assign accounts if it deems necessary to ensure the maximum revenue potential is achieved.

7. The Defendant denies paragraph 8 of the Statement of Claim and puts the Plaintiffs to strict proof thereof. The Defendant contends that at all material times it had the contractual obligation to either assign, withdraw or reassign the accounts and which accounts at all times remained the property of the Defendant pursuant to clause 15 aforesaid.

8. The Defendant denies TO BE COMPLETED.

...

14. BTC denies paragraph 17 of the Statement of Claim and avers that at all material times the accounts remained and are the property of the BTC and that the Plaintiffs had no proprietary right or interest (whether legal or equitable) in respect of the same and thereby the Plaintiffs cannot assert the protection from deprivation of property as provided for in Article 27 of the Constitution."

16. The Defendant contends that the entry of 'new' Sales Agents could not and did not deprive the Plaintiffs or any of them of a fair opportunity to earn new accounts in light of the Defendant's decision to waive all charge back penalties for 2003 contract year; its decision to commence open session immediately in April 2003 and the Defendant's launch of advertisement on its website, which was also for sale by the said Agents.

17. The defendant further contends that the generation of revenue by the Plaintiffs was based on their best efforts to source customers for enlistment in the Defendant's directory publication and whilst the Plaintiffs were assigned accounts their revenue was not limited to the assigned accounts. In this regard, the Plaintiffs and each of them had a duty and an obligation to source new customers for enlistment and/or to convince customers to increase their listings. The Defendant avers that it did not in any material way or otherwise deprived the Plaintiffs of such opportunities.

18. The Defendant further contends that the Plaintiffs and each of them had a duty to mitigate any perceived losses they presumably could have suffered by the Defendant's right to elect to engage new Sales Agents and to reassign the Defendant's accounts. In this regard, the Defendant avers that the Plaintiffs and each of them had a right and duty to source new or increased accounts so as to improve any perceived loss of revenue and in this regard any such loss in revenue (which is not conceded) was due in large measure to the Plaintiffs' conduct, inaction or otherwise in failing to sign on new or increased accounts for listing in the directory.

19. The Defendant also contends and avers that by signing the Defendant's standard agreement on or about 17th April, 2013 and in executing a similar agreement in subsequent years and by agreeing to abide by the Defendant's terms and conditions the Plaintiffs and each of them are estopped (or alternatively waived any right) from asserting that the Defendant breached the sales agreement and/or that they sustained loss arising from the engagement of the new sales agents in 2003 and/or from the assignment of the various accounts during the canvass period in 2003 (and beyond).

20. The Defendant further contends that the Plaintiffs' voluntary execution of the agreements in 2003 (prior to the commencement of the action) and in 2007 and the Defendant's reliance on the efforts of the Plaintiffs to engage in sales of listings for the Defendant's reliance on the efforts of the Plaintiffs to engage in sales of listings for the Defendant's directory publication (in 2003 and subsequent years), in conduct which in law and/or equity amounts to an election and/or waiver by the

Plaintiffs, from which it will be prejudicial, unjust and inequitable to allow them to change their positions in all of the prevailing circumstances.

21. Save as is hereinbefore specifically admitted, the Defendant joins issue with the Plaintiffs on the allegation of facts as contained in the Statement of Claim as if the same is set out individual and traversed seriatim.

7. In its reply filed 24 June 2004, the plaintiffs joined issue with BTC upon paragraphs 1 to 16 of the defence. The plaintiffs did not amend their reply in response to the amended defence.
8. The question arose in the course of Mr Bethel's cross examination of Felicity Johnson as to whether the plaintiffs were withdrawing their claim for damages for breach of Article 27 (by paragraph 17 of the statement of claim). Mr Rigby seems to think that they had. (See paragraph 67 of his closing submissions dated 24 September 2014 and transcript 6 August 20 page 45 line 9 to page 46 line 20.) I do not agree. That claim remains a live issue as demonstrated by the fact that Mr Bethel addresses the claim at paragraph 2.10 of his Legal Submissions.
9. Whilst I do not refer in this judgment to all of the witness statements filed by the plaintiffs and the defendant, respectively, their written submissions and the authorities on which they rely and the evidence, I have read and considered them all.

The Contract

10. The document which governs the relationship between each of the plaintiffs and BTC is the agreement which incorporates the Conditions of Service For Sales Agent ('the contract"). (See, for example, the contract dated 17 April 2003 entered into between Darren Smith and BTC, which is exhibited to the Witness Statement of Tellis Symonette dated 15 March 2013 at Tab 2). The plaintiffs refer only to Clause 15 of the Conditions of Service For Sales Agent. BTC highlights, in addition, clause 2 of the Conditions of Service For Sales Agent which concerns Further Engagement. Clause 13 is also extracted below as it concerns Remuneration.

"2. FURTHER ENGAGEMENT
One month prior to the completion of the term of this Agreement, the Sales Agent will give notice in writing to the Company that the Sales Agent is desirous of continuing the Agency, and the Company shall thereupon in its absolute discretion decide whether it will offer the Sales Agent a further appointment. If the Company offers employment, the re-engagement will be on such terms and conditions as are mutually agreed."

"13.REMUNERATION
In the capacity as Sales Agent, the total remuneration to which the Sales Agent shall be entitled shall be on the basis of 15% (fifteen percent) commission paid on the existing renewed revenue and 27.5% (twenty-seven and one half percent) of new and increased sales."

(a) In the event of a decrease of revenue or cancellation of revenue due to negligence or other fault of the Agent by a customer such decrease or cancellation shall be charged back and such charge-back will be calculated at the rate the Agent was originally paid on the account of that decrease or cancellation

PROVIDED THAT where such decrease or cancellation is due to:

i. Any in-house error or any error by the printers; or
ii. The legitimate demise of a business or proprietor (in which case the customer must also cease the telephone number related to the advertisement); or
iii. Such other reason which in the sole discretion of the Company does not warrant a charge-back:

the Agent will not be charged back if management is advised in writing of the said decrease or cancellation prior to the last day of the canvass period.

(b) NON CANVASS PAY

The Company agrees to pay a maximum of 5 percent on net commission earnings to the Sales Agent during the non canvass period; October 1st to January 31st, provided that all terms of this contract have been fulfilled to the satisfaction of the Company. This amount is to be paid in equal monthly installments during the non-canvass period. For the purposes of this paragraph "net earnings" does not include allowance and amounts repayable by the Sales Agent to the Company under the heading of "Adjustments."

"15. ASSIGNMENT OF ACCOUNTS
The accounts are considered the property of the Corporation which reserves the right to assign, withdraw or re-assign them as required for the maximum benefit of the Corporation.
The amount assigned to the Sales Agent will be related to the Sales Agent's ability and past or expected performance. During the final months of the canvass period the Corporation will re-assign accounts if it deems necessary to ensure the maximum revenue potential is achieved."

The Memorandum of 19 March 2003

11. Both sides refer to the Memorandum dated 19 March 2003 by which BTC notified the plaintiffs that the accounts would be re-assigned in the following manner; "Returning Agents (old) 55%" and "Directory Publication (office) 45%" for its true terms and effect. The 19 March 2003 Memorandum states as follows:

> **"MEMORANDUM**
>
> **March 19, 2003**
>
> **To:** **Sales Agents**
> **From:** **Mr. Claude Hanna, Senior Manager, Directory Publications**
> **Subject:** **Distribution of Revenue for 2003 canvass year**
>
> ---
>
> **Please be advised that the BaTelCo have taken the decision to redistribute its Directory Sales Revenue in respect of New Providence and accounts related to New Providence.**
>
> **Revenue will be distributed on the following basis:-**
>
> | | |
> |---|---|
> | **Returning Agents (old)** | **55%** |
> | **Directory Publications (office)** | **45%** |
>
> **Revenue retain by Directory Publication will be distributed in a manner to be determined by BaTelCo.**
>
> **Be further advised that revenues/accounts relating to the Family Islands and South Florida will also be retain** (sic) **by BaTelCo to be distributed in a manner to be determined by BaTelCo."**

The Evidence

Witness Statements

12. At paragraph 7 of her Third Witness Statement, Clarice Butler, one of the plaintiffs, exhibits a spreadsheet from which she avers that the figures reflect that the Seasoned Agents consistently generated between 62% and 64% of total commission earned in each year and consistently out-performed the new Sales Agents.

13. At paragraph 4 of her Second Witness Statement of Valarie Stubbs, a Directory Sales Agent, states :

> **"The unilateral deprivation of revenue accounts by the BTC in February, 2003 had a disproportionate impact upon me due to the fact that in addition to the loss of 45% of all Nassau-based revenue accounts, I was also summarily deprived of all my Family Island Accounts in Inagua, and Abaco. "**

14. She further states that she protested to Claude Hanna in a meeting with Sales Agents about the disproportionate impact and we were told in no uncertain terms, essentially, that it was "take it or leave it." (Paragraph 6 her Witness statement.)
15. The statement goes on to state that she never agreed to the revenue split imposed by BTC in 2003.
16. Exhibited to the Third Witness Statement of Darren Smith are copies Sales Agents of two contracts entered into by him with BTC on 15 June, 1994 and 23 October 2001, respectively.
17. The Witness Statement of Ryan Antonio, Vice President for Credit and Collections at BTC exhibits documents the Court requested by way of a Writ of Subpoena Duces Tecum Ad Testifcandem.
18. In her Witness Statement, Felicity L. Johnson, Senior Vice President of the BTC with responsibility for Legal and Regulatory Affairs, states that she is the person who reviewed the contracts for the Sales Agents at the time in question.
19. At paragraph 7 Ms Johnson's evidence was that the plaintiffs executed the standard contract which signified that they intended to abide by the terms. At paragraph 10 she states that at no time did anyone dispute the right of BTC to assign the accounts as it so wished.
20. At paragraph 17 of Ms. Johnson's statement she says that to her knowledge none of the Sales Agents objected to the BTC's decision to allocate the various accounts she suspected this was so because they understood the accounts belonged to the BTC.
21. At paragraph 19 Ms Johnson states that while the plaintiffs allege that they have a proprietary right in the accounts, this view appears to conflict with the wording of Clause 15 and is a view that certainly fell outside of the custom of usage between the agents and the BTC.

The viva voce evidence

22. In cross examination Clarice Butler was asked what she considered to be the breach carried out by BTC. The Plaintiff went on further to describe what she felt was a fundamental breach by BTC:

> **"Q. And you said that you had the alternative of treating the contract as a fundamental breach?**
>
> **A. Yes, sir.**
>
> **Q. And that fundamental breach was the 45/55 split? The way the split took place;**
>
> **A. Yes sir.**
>
> **Q . The way it took place, not the actual split?**
>
> **A. The actual split, as well as previously explained, sir, 17 percent versus the 45/55."**
>
> **Page 41 of Transcript**

23. Ms. Butler also testified in cross examination as to why she renewed the contract:

> **"Q. So why did you decide to stay on the job?**
> **A. Like I answered yesterday, sir, I have to work. I have a family to take care of. I have to earn a living like anyone else.**
> **Q. And you said that you got legal advice before you signed the April 2003 agreement; correct?**
> **A. Yes, sir, because we signed it. We wanted to work.**
> **Q. Did you sign it under duress; were you pressured to sign it?**
> **A. No, sir. I was not pressured to sign it by BTC.**
> **Q. Were you forced to sign it?**
> **A. No, sir."**

24. Ms. Butler also stated in her testimony that she was aware that the accounts were the property of BTC:

> **"Q. Okay and you understand that to mean the accounts belong to BTC?**

A. I understand that the account are considered the property of BTC, but once they are within my portfolio, sir, those are the ones that I work from year to year.

Q. In your portfolio; what is that?

A. The portfolio consists of the revenue that I work, sir, that is mine that I work.

Q. The revenue is yours?

A In terms of – that I work, sir on behalf of BTC.

Q. I am trying to understand, what do you say is yours then? Are you saying that the revenue is yours?

A. No.

Q. Okay, tell me what is in the portfolio then?

A. The contract. The customer contract that make up the revenue.

Q. Okay. The customer contracts would be in your portfolio?

A. That is correct.

Q. Are they the same thing as the accounts?

A. Yes, Sir.

Q. The customer contracts and the accounts are the same?

A. From where I am sitting; yes, sir.

Q. Now you are saying that you understand that the customers' contracts are the property of BTC?

A. Are considered the property of BTC; yes, sir.

Q. And you also understand in clause 15 that BTC had a right to, as the word say, look at it; to assign, withdraw, or to reassign them, meaning the accounts, as required for the maximum benefit of the corporation. Do you see that?

A. Right.

Q. You see that in the clause?

A. I see that there."

(Page 90 -91 of transcript)

25. Further to that at trial Ms. Butler testified that she was aware of the conditions of the contract signed in April 2003.

"Q. Did you understand, Ms. Butler, that by signing the contract on 17th of April 2003, that you had agreed to work on the basis of what your say was your portfolio that was assigned to you as of the date of the signing? Did you appreciate that?

A. I already answered that, sir. I knew exactly what it was I was working – I also knew we had a lawyer who was handling the situation.
THE COURT - The answer is yes, she understood."

26. The plaintiff Valarie Stubbs, too, testified as to her reasons for signing the contract at trial (beginning at page 23 Transcript).

"Q. Why did you sign the contract, Ms. Stubbs?
A. Mr. Rigby.
Q. Yes ma'am
A. If you go and discuss - - we went and do our best to try get this thing resolve right.
Q. Yes.
A. When we had the meeting with Claude and we asked Claude look here you know this really is too much, that is too much. You know what the Claude said to us? Batelco had made the decision and there is nothing we could do. In other words, he was telling us to take it or leave it. I have two adoptive daughters in private school, I had a mortgage to pay, so I wasn't just going to say I ga [will] leave it because I had responsibilities I had to fulfill, so I stayed. I signed the contract."

27. Ms Stubbs also testified at page 24 lines 7 to 17) that she was not forced to sign the contract.

"Q. Before you went to the chairman, alright. So at the time you signed the contract you really knew then that the 45/55 split was it. That was the done deal?

A. Yeah, they made up their mind what they was going to do.

Q. Okay. And so when you signed the contract you agreed to work those accounts on the 45/55 split?

A. I had no other chase (sic).

Q. You had no other choice, okay. Claude didn't force you to sign the contract did he?

A. Nobody forced me to do anything."

28. Darren Smith when cross-examined testified that he remembered very little of the events that preceded the revenue split. He did not recall that 19 March 2003

Memorandum being sent, or a meeting with Claude Hanna, or the time frame of the engagement of new Sales Agents.

29. He did however admit to knowing of the proposed revenue split prior to signing the contract in April 2003. (Page 56 of Transcript)

> **"Q. And if you when you signed the contract of the 17th of April 2003, is it not correct, Mr. Smith, that you signed that knowing that there was a 45/55 percent split of the revenue?**
>
> **A. Probably did.**
>
> **Q. Yes. And you knew that prior to signing the contract?**
>
> **A. That there was a 45/55 percent split?**
>
> **Q. Yes.**
>
> **A. More than likely.**
>
> **Q. You knew that as early as probably March of 2003, did you?**
>
> **A. Whenever they processed that to it, that's when we began to get knowledge of it."**

The Constitutional Law Claim

30. The plaintiffs allege that BTC breached Article 27 of the Constitution of The Bahamas by depriving the plaintiffs of property, namely, revenue and goodwill generated from the sale of advertisements published in BTC's Telephone Directory, without compensation. Article 27 provides as follows:

> **"27.(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –**
> **(a) the taking of possession or acquisition necessary in the interests of public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit or the economic well-being of the community; and**
> **(b) the necessity therefore is such as to afford reasonable justification for causing of any hardship that may result to any person having an interest in or right over the property; and**
> **(c) provision is made by a law applicable to that taking of possession or acquisition –**

(i) for the making of prompt and adequate compensation in the circumstances; and
(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether indirect or on appeal from some other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and the for the purpose of obtaining prompt payment of that compensation; and

(d) any party to such proceedings in the Supreme Court relating to such a claim is given by law the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction."

31. The plaintiffs' case is that the commissions payable under their respective contracts on the revenue which is generated from the sale of advertisements published in BTC's Telephone Directory constitute "property" and that by varying the distribution of the accounts (from which the commissions are generated) BTC in effect deprived them of such property. That is the effect of Clarice Butler's testimony at pages 90 to 91 where she asserted that the accounts were the property of BTC but once they were assigned to her (or included in her portfolio) the accounts became hers.

32. Mr Bethel submits at paragraph 2.10 of his Legal Submissions:

> **"The Plaintiffs also claim for a breach of a Constitutional right not to have property deprived without compensation. As shown in the case of Attorney General of The Gambia v Momodou cited by the Defendant at Tab 3 of its Opening Submissions, the word "property" in Constitutional Law is to be given a "general and purposive construction", and is to be construed "in a wide sense" and even so little as a "chose in action" is considered to be property which cannot be completely derived without due compensation."**

33. Mr Rigby on behalf of BTC contended that the plaintiffs had no such right over or interest in a minimum (or specified) income for 2003 or any year thereafter pursuant to the terms of their respective contracts with BTC. He relied on the very useful case of **King (Gladwyn) v Attorney General** (1993) 45 WIR 50, on appeal to the Privy Council from the Court of Appeal of Barbados. In that case, the appellant held a public office under the Crown in the right of Barbados. Under the Civil Establishment Act emoluments on an incremental basis were attached to the office held by her. In 1991 Parliament enacted the Public Service Reduction of Emoluments Act which reduced her emoluments

and increments between 1991 and 1993. The appellant challenged the validity of the 1991 Act, claiming that it contravened section 16 of the Constitution (no property of any description to be compulsorily taken possession of except under the authority of a written law providing for compensation). Her claim was dismissed by Sir Denys Williams CJ who held that the reduction of the appellant's salary was lawful and did not amount to a deprivation of property. Both the Court of Appeal and the Privy Council upheld the decision of the Chief Justice. Lord Templeman in delivering the advice of the Board said at page 93:

> **"The appellant had no right to a minimum salary. If she had no right to a minimum salary, she had no property protected by sections 11 and 16 of the Constitution. Her only right was to such emoluments as the Minister under the Civil Establishment Act or as Parliament in exercise of its legislative powers from time to time attached to her office. The emoluments of the appellant were lawfully reduced by the 1991 Act. Sir Denys Williams CJ, sitting in the High Court, and the Court of Appeal (Smith and Moe JJA; Husbands JA dissenting) came to the same conclusion. Their lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the Attorney-General before their lordships' Board."**

34. In the instant case, the plaintiffs were entitled by clause 13 of the contract to the following remuneration only: 15% commission on existing revenue; 27.5% commission on new and increased sales; where decreased revenue or cancellation of revenue was the result of negligence on the part of the Sales Agent, such decrease or cancellation was to be charged back to the Sales Agent; and 5% on the net commission earnings during the non-canvass period. In the **King** case, notwithstanding that under the Civil Establishment Act emoluments on an incremental basis were attached to the office held by the appellant, the Privy Council held that (i) the appellant had no right to a minimum salary; and (ii) her only right was to such emoluments as the Minister under the Civil Establishment Act or as Parliament in exercise of its legislative powers from time to time attached to her office. Because the appellant had no right to a minimum salary, she had no property protected by sections 11 and 16 of the Barbados Constitution.

35. Applying the principles cited in **King** and **Attorney General of The Gambia v Momodou** and construing the word "property" in Article 27 "in a wide sense" and giving that word a "general and purposive construction", I am satisfied that on the facts and the evidence in this case the plaintiffs do not have any property interest BTC's Directory Sales Revenue in respect of revenue generated from the sale of advertisements by the Sales Agents in respect of New Providence, the Family Islands and South Florida New Providence and the accounts related to New Providence, the Family Islands and South Florida. I agree with Mr Rigby that the plaintiffs' only right or interest under their respective contracts with BTC is the right to be paid the agreed commissions and other remuneration as set out in their contracts. That they were so paid is not in contention.

36. The plaintiffs had and have no property interest in the advertising contracts. Therefore, the plaintiffs' claim for a declaration that the BTC violated Article 27(1) of The Bahamas Constitution in summarily depriving the plaintiffs as a group of more than one-half of revenue is therefore refused.

Breach of Contract, Damages and Loss of Chance arising out of the reassignment of accounts pursuant to the 19 March 2003 Memorandum and the 19 April 2003 contracts

37. There was no suggestion by the plaintiffs that once they had executed a contract with BTC to sell Directory Advertisement BTC could not thereafter reassign the customer accounts. In fact they plead at paragraph 5 of the statement of claim that "The Accounts are considered the property of [BTC] which reserves the right to assign, withdraw or re-assign them as required for the maximum benefit of [BTC]. (Clause 15 of the contract.) Their allegation was that the reassignment of the accounts in 2003 was imposed by the defendants "without the consent of the Plaintiffs" and "without compensation or due or adequate notice, contrary to the amicable agreement" that 17% of the existing revenue of the plaintiffs would be made available to BTC for re-

distribution to the new Sales Agents. The plaintiffs' evidence does not support that allegation. It is their evidence that there were quite a number of meetings with BTC executives (the minutes of which are included in the bundles) and correspondence between Clarice Butler, Arlington Miller, the plaintiffs representative and BTC executives to discuss the matter and in the end, the plaintiffs signed the contracts between themselves respectively and BTC which embodied the 55/45 split and they did so without being forced to do so. The plaintiffs' witnesses all admitted under cross examination that they were not forced to sign the 17 April 2003 contract, that at the time of signing they were aware that the contract provided for a 55/45 split of the accounts and that they continued to work under that contract and receive commissions based on the 55/45 split. Valarie Stubbs testified in cross examination, "Nobody forced me to do anything" when asked by Mr Rigby if Claude Hanna forced her to sign the contract. Claudette Butler also testified that she knew exactly what she was doing when she signed the 17 April 2003 contract, but that they had a lawyer who was handling the situation. Darren Smith, too, admitted that he knew of the 55/45 split when he signed the agreement.

38. The plaintiffs' explanation for executing the 17 April 2003 contract was that they had no choice. Clarice Butler testified that she need her job as she had a family to take care of. Valaria Stubbs' evidence was Claude Hanna told then in no uncertain terms essentially that it was a "take it or leave it" deal and she needed a job. The fact that the plaintiffs might have needed the job does not negate the fact that the plaintiffs voluntarily and without force signed the 17 April 2003 contract embodying the 55/45 split. The case of **Smith v. Bahamas Hotel Catering and Allied Workers Union** [1987] BHS J. 95 is of assistance in that regard.

39. That case was an appeal from the judgment of Sir Denis Malone, Snr. J., dismissing the summons brought by the plaintiffs Paulette Smith, Claudia McNeil and Thomas Albury against the respondents. The appellants were not members of the Union and objected to the deduction of Union dues from their pay without their consent pursuant to compulsory check-off clause in the

collective bargaining agreement (executed by the Union on behalf of all hotel workers in The Bahamas) which had been inserted in the collective bargaining agreement pursuant to the provisions of section 43A of the Industrial Relations Act, 1970 (No. 14 of 1970) as inserted by section 10 of the Industrial Relations (Amendment) Act, 1979 (No. 4 of 1979). The plaintiffs contended that section 43A of the Act was unconstitutional as it contravened the provisions of Articles 24, 26, and 27 of the Constitution of The Bahamas (which relate respectively to the protection of freedom of assembly and association, the protection from discrimination on the ground of political opinions (among other grounds) and the protection from deprivation of property). Sir Denis Malone held that section 43A of the Act "is not an intervention by Parliament to authorise or facilitate coercion by legalising acts directed to that end and that it does not compel the deduction." Accordingly, he found that section 43A does not infringe Article 27 of the Constitution (which protects the freedom from deprivation of property) either directly or indirectly.

40. On appeal, Osadebay JA, who delivered the judgment of the court refusing the appeal, said in part:

> **"21. So each employee, including the plaintiffs, would have been made aware that the first defendant was the bargaining agent recognized in respect of his or her unit as well as of the term relating to the compulsory check-off of contribution required by the provisions of section 43A of the Act. ... So the plaintiffs Paulette Smith and Claudia McNeil were informed by way of being provided with a copy of the industrial Agreement that in future this deduction would be a term in their contract of employment. They were put to their election at this point either to accept the new term or seek other employment. They made their election by continuing to work and the deductions were made. It was not suggested that these plaintiffs were employees under a contract for a fixed term whereby there would be no right in their employers to make or impose new contracts during such term. These employees could not insist on retaining their employment on their own terms, or on terms other than those lawfully inserted in the collective agreement. In respect of the plaintiff Albury, he was employed to princess Tower Hotel subsequent to the execution of the industrial agreement and clearly chose to be employed under its terms. If he objected to the compulsory check-off terms contained in the agreement he was free to refrain from accepting such employment.**
>
> **22. In these circumstances, can it be said that there was a contravention of Article 27 of the Constitution? Article 15 of the Constitution affords every person in the Bahamas protection of the rights and freedom specified in Articles 24, 26 and 27 (subject to such limitations of that protection as are contained in those provisions). Article 27(1) provides that "no property of any**

description shall be compulsorily taken possession of, and no interest shall be compulsorily acquired" except where certain specified conditions are satisfied. None of the specified conditions are relevant to this case. While section 43A of the Act provided for a compulsory check-off of contributions of employees to be included as a term in the industrial agreement in question, the plaintiffs Smith and McNeil were free to elect not to continue in the employer's employment while the plaintiff Albury was free to decline employment with Princess Tower Hotel on those terms. None of the plaintiffs was required by law to continue in his or her employment with the third defendants or to accept employment on the terms contained in the industrial agreement. I would conclude therefore that neither section 43A of the Act nor section 31 of the Agreement contravene the provisions of Article 27 of the Constitution.

41. Similarly, once BTC included the 55/45 split as a term of the 17 April 2003 contracts, the plaintiffs were free to elect not to continue selling advertisements for BTC on the terms set out in the 17 April 2003 contract. What they were not free to do was to insist on retaining their employment on their own terms, or on terms other than those lawfully inserted in the contract by BTC.

Findings

42. I make the following findings based on the evidence and a consideration of the written and oral submissions on behalf of the plaintiffs and the defendant and the case law to which counsel referred.

    (a) The plaintiffs did not and do not have any property interest in BTC's Telephone Directory advertisement accounts or contracts and the revenue generated from the sale of such advertisements.

    (b) The redistribution of BTC's Telephone Directory advertisement accounts or contracts and the revenue generated from the sale of such advertisements on the basis of 55% to the plaintiffs and 45% to the new Sales Agents ("the said redistribution") did not breach the respective contracts between the plaintiffs and BTC.

    (c) The plaintiffs agreed to the said redistribution and evidenced their agreement by executing the respective contracts dated 17 April 2003.

(d) In the result, the plaintiffs' claims set out in paragraphs 11 through 16 and 18 inclusive of the statement of claim have not been made out and are rejected.

Conclusion

43. I order accordingly:

(a) The plaintiffs' claim for a declaration that the BTC violated Article 27(1) of The Bahamas Constitution in summarily depriving the Plaintiffs as a group of more than one-half of revenue is refused.

(b) The plaintiffs' claim for damages for breach of contract and loss of chance; special damages, economic loss, interest, costs, and further or other relief is refused.

(c) The plaintiffs are to pay BTC's costs of this action, such costs to be taxed if not agreed.

Dated this 2 May 2014

Claire Hepburn

Claire Hepburn

JUSTICE